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THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 444 Session of 2013

INTRODUCED BY PILEGGI, SMUCKER, RAFFERTY, WAUGH, FONTANA, FOLMER, TEPLITZ, GREENLEAF, WARD, ALLOWAY, YAW, YUDICHAK, BAKER, FERLO, MENSCH, ERICKSON, VANCE, VULAKOVICH, FARNESE AND BROWNE, APRIL 26, 2013

REFERRED TO STATE GOVERNMENT, APRIL 26, 2013

AN ACT

Amending the act of February 14, 2008 (P.L.6, No.3), entitled "An act providing for access to public information, for a designated open-records officer in each Commonwealth agency, local agency, judicial agency and legislative agency, for procedure, for appeal of agency determination, for judicial review and for the Office of Open Records; imposing penalties; providing for reporting by State-related institutions; requiring the posting of certain State contract information on the Internet; and making related repeals," further providing for definitions; providing for Pennsylvania Interscholastic Athletic Association; further providing for requests; providing for inmate access; and further providing for access, for requests, for written requests, for production of certain records, for exceptions for public records, for agency response in general, for filing of appeal, for appeals officers, for specified agencies, for fee limitations and for Office of Open Records.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The definitions of "confidential proprietary information," "independent agency," "local agency," "personal financial information" and "State-affiliated entity" in section 102 of the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law, are amended and the section is amended by

adding definitions to read:

Section 102. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

"Commercial purpose." The use of a record:

(1) for the purpose of selling or reselling any portion of the record;

(2) to obtain names and addresses from the record for the purpose of solicitation; or

(3) in a manner through which the requester can reasonably expect to make a profit.

The term does not include the use of a public record by an educational or noncommercial scientific institution for scholarly or scientific research or the use of a public record by the news media for dissemination in a newspaper, periodical or radio or television news broadcast.

* * *

"Confidential proprietary information." Commercial or financial information received or created by an agency:

(1) which is privileged or confidential; and

(2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

* * *

"Funding source." The General Fund, a special fund or other Federal or State funds appropriated by the General Assembly by statute or executive authorization.

* * *

"Independent agency." Any board, commission, authority or other agency or officer of the Commonwealth, that is not subject to the policy supervision and control of the Governor. The term does not include a legislative or judicial agency.

* * *

"Local agency." Any of the following:

(1) Any political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school.

(2) Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity. This paragraph includes an economic development authority and an industrial development authority.

(3) Any campus police department of a State-owned or State-related college or university.

* * *

"Personal financial information." An individual's personal credit, charge or debit card information; bank account information; bank, credit or financial statements; account or PIN numbers; forms required to be filed by a taxpayer with a Federal or Commonwealth taxing authority; and other information relating to an individual's personal finances.

* * *

"State-affiliated entity." A Commonwealth authority or Commonwealth entity. The term includes the Pennsylvania Higher Education Assistance Agency and any entity established thereby, the Pennsylvania Gaming Control Board, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal

Retirement Board, the State System of Higher Education, a community college, the Pennsylvania Turnpike Commission, the Pennsylvania Public Utility Commission, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority[, the Pennsylvania Interscholastic Athletic Association] and the Pennsylvania Higher Educational Facilities Authority. The term does not include a State-related institution.

* * *

"Time response log." A log created, received, maintained or retained by a public-safety answering point (PSAP), as defined in 35 Pa.C.S. § 5302 (relating to definitions), containing the following information:

(1) The time the call was received by the PSAP.

(2) The time the PSAP contacted or dispatched the appropriate agency for response.

(3) The time the appropriate agency responded.

(4) The time the appropriate agency arrived on the scene.

(5) The time the appropriate agency became available.

(6) The address of the incident or the cross street or mile marker nearest the scene of the incident.

* * *

Section 2. The act is amended by adding a section to read:

Section 307. Pennsylvania Interscholastic Athletic Association.

This act shall apply to the Pennsylvania Interscholastic Athletic Association.

Section 3. Section 506 of the act is amended to read:

Section 506. Requests.

(a) Disruptive requests.--

(1) An agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.

(2) A denial under this subsection shall not restrict the ability to request a different record.

(3) If a request or a related group of requests would be unduly burdensome, the agency may petition a court of competent jurisdiction for a protective order. The court may issue a protective order upon a showing of good cause, including:

(i) That the provision of the records requested be prohibited.

(ii) That only certain records be released.

(4) An agency may deny requests to a party to litigation which are related to pending litigation or which were previously made in litigation discovery.

(b) Disaster or potential damage.--

(1) An agency may deny a requester access:

(i) when timely access is not possible due to fire, flood or other disaster; or

(ii) to historical, ancient or rare documents, records, archives and manuscripts when access may, in the professional judgment of the curator or custodian of records, cause physical damage or irreparable harm to the record.

(2) To the extent possible, the contents of a record under this subsection shall be made accessible to a requester even when the record is physically unavailable.

(c) Agency discretion.--An agency may exercise its

discretion to make any otherwise exempt record accessible for inspection and copying under this chapter, if all of the following apply:

(1) Disclosure of the record is not prohibited or restricted under any of the following:

(i) Federal or State law or regulation.

(ii) Judicial order or decree.

(2) The record is not protected by a privilege.

(3) The agency head determines that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access.

(d) Agency possession.--

(1) [A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.] An agency which is a party to a contract shall provide a copy of the contract and any public records of the agency relating to the contract.

(2) Nothing in this act shall be construed to require access to any other record of the party in possession of the public record.

(3) A request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency. Upon a determination that the record is subject to access under this act, the open records officer shall assess the duplication fee established under section 1307(b) and upon collection shall remit the fee to

the party in possession of the record if the party duplicated the record.

Section 4. The act is amended by adding a section to read:

Section 508. Inmate access.

(a) Status.--Except as provided in subsection (b), an inmate may not be a requester for purposes of this act.

(b) Records.--An agency shall provide an inmate with copies of the following records as they pertain to the inmate if the disclosure of the record will not diminish the safety or security of any person or correctional facility:

(1) Criminal records relating to the criminal commitment of the inmate.

(2) Institutional housing information.

(3) The inmate's financial records.

(4) The inmate's work records.

(5) The inmate's educational records.

(6) The inmate's disciplinary records.

(7) Disciplinary and other policies adopted by the correctional institution.

(8) A record relating to any Federal or State benefit received by the inmate or for which the inmate is eligible.

(9) The inmate's tax records.

(10) The inmate's voting records.

(11) Records relating to any license issued to the inmate by a Commonwealth or local agency.

(c) Applicability.--Nothing under this section shall prohibit a correctional institution from voluntarily permitting an inmate to have access to records not listed under subsection (b) or prevent a correctional institution from complying with a lawful subpoena or court order.

Section 5. Sections 701, 702, 703 and 707 of the act are amended to read:

Section 701. Access.

(a) General rule.--Unless otherwise provided by law, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act. A record being provided to a requester shall be provided in the medium, computer file format or other format requested if it exists in that medium, computer file format or other format; otherwise, it shall be provided in the medium in which it exists. Public records, legislative records or financial records shall be available for access during the regular business hours of an agency.

(b) Construction.--Nothing in this act shall be construed to require access to any computer either of an agency or individual employee of an agency.

Section 702. Requests.

Agencies may fulfill verbal[, written or anonymous verbal] or written requests for access to records under this act. If the requester wishes to pursue the relief and remedies provided for in this act, the request for access to records must be a written request.

Section 703. Written requests.

A written request for access to records may be submitted in person, by mail, by e-mail, by facsimile or, to the extent provided by agency rules, by any other electronic means. A written request must be addressed to the open-records officer designated pursuant to section 502 or to the administrative office of the agency. [Employees of an] The administrative office of the agency shall [be directed to] promptly forward

requests for records to the agency's open-records officer. A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested and shall include the name and address to which the agency should address its response. [A] Except as required under section 707(d), a written request need not include any explanation of the requester's reason for requesting or intended use of the records unless otherwise required by law. A written request must include the name and address of the requester and the name of the agency to which the request is addressed.

Section 707. Production of certain records.

(a) General rule.--If, in response to a request, an agency produces a record that is not a public record, legislative record or financial record, the agency shall notify any third party that provided the record to the agency, the person that is the subject of the record and the requester.

(b) Requests for trade secrets.--An agency shall notify a third party of a request for a record if the third party provided the record and included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information. Notification shall be provided within five business days of receipt of the request for the record. The third party shall have five business days from receipt of notification from the agency to provide input on the release of the record. The agency shall deny the request for the record or release the record within ten business days of the provision of notice to the third party and shall notify the third party of the decision.

(c) Transcripts.--

(1) Prior to an adjudication becoming final, binding and nonappealable, a transcript of an administrative proceeding shall be provided to a requester by the agency stenographer or a court reporter, in accordance with agency procedure or an applicable contract.

(2) Following an adjudication becoming final, binding and nonappealable, a transcript of an administrative proceeding shall be provided to a requester in accordance with the duplication rates established in section 1307(b).

(3) Nothing in this subsection shall be construed to require an agency to transcribe a proceeding solely for purposes of responding to a request under this act.

(d) Commercial requests.--An agency may require a requester to certify in writing whether the request is for a commercial purpose. Certification shall be submitted on a form developed by the Office of Open Records that shall provide a checkoff for the requester to use to indicate whether the request is for a commercial purpose. A requester that submits a false written statement shall be subject to 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Section 6. Section 708(b)(10)(i) and (ii), (13), (17) and (18) and (c) of the act are amended and subsection (b) is amended by adding paragraphs to read:

Section 708. Exceptions for public records.

* * *

(b) Exceptions.--Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

* * *

(5.1) The payment records of a person receiving services

from a public water or sewer authority or other municipal authority, municipality or cooperative that provides electricity, water, sewer, storm water, natural gas or similar service. The authority, municipality or cooperative shall establish a process to provide a clearance certificate to a person to certify that all fees and charges owed have been paid. A reasonable fee for a clearance certificate may be charged. This paragraph shall not apply to reports of aggregate payments made by a municipality, authority or cooperative to assist low-income consumers or other consumers in obtaining services. If funds are owed, the amount of the delinquency shall appear on the clearance certificate.

* * *

(6.1) Tax payment records in the possession of a tax collector. A tax collector shall establish a process to provide a clearance certificate to a person certifying that all local taxes owed have been paid. If funds are owed, the amount of the delinquency shall appear on the clearance certificate. A reasonable fee for a clearance certificate may be charged. As used in this paragraph, the term "tax collector" means an elected tax collector or an employee or contractor of an agency that collects local taxes pursuant to law.

* * *

(10) As follows:

(i) A record that reflects, contains or includes:

(A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or

officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

(ii) Subparagraph (i)(A) shall apply to agencies subject to 65 Pa.C.S. Ch. 7 (relating to open meetings) in a manner consistent with 65 Pa.C.S. Ch. 7. A record which is not otherwise exempt from access under this act and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 shall be a public record regardless of whether a vote occurs at the meeting.

* * *

(13) Records that would disclose the identity of, or financial information relating to, an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

* * *

(17) [A] Except for a safety inspection report made pursuant to Federal or State law, a record of an agency relating to a noncriminal investigation, including:

(i) Complaints submitted to an agency.

(ii) Investigative materials, notes, correspondence and reports.

(iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12, 1986 (P.L.1559, No.169), known as the Whistleblower Law.

(iv) A record that includes information made confidential by law.

(v) Work papers underlying an audit.

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.

(B) Deprive a person of the right to an impartial adjudication.

(C) Constitute an unwarranted invasion of privacy.

(D) Hinder an agency's ability to secure an administrative or civil sanction.

(E) Endanger the life or physical safety of an individual.

(18) Emergency dispatches as follows:

(i) Records or parts of records, except time response logs, pertaining to audio recordings, telephone

or radio transmissions received by emergency dispatch personnel, including 911 recordings.

(ii) This paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure.

(iii) The home address of the individual who accesses emergency dispatch. The record may include the nearest cross streets to that address.

* * *

(31) An agency's bank account numbers, bank routing numbers, credit card numbers or passwords.

(32) A record of any of the following:

(i) A volunteer ambulance service.

(ii) A volunteer fire company.

(iii) A volunteer rescue company.

(iv) A volunteer water rescue company.

(v) A volunteer organization that provides hazardous materials response services.

(vi) A volunteer organization that provides emergency medical services.

Section 506(d)(1) shall apply to a volunteer organization under this paragraph that contracts with a local agency to provide services to the local agency.

(c) Financial records.--The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (11), (13), (16) or (17). An agency shall not disclose the identity of an individual performing an undercover or covert law

enforcement activity.

* * *

Section 7. Sections 901 and 1101 of the act are amended to read:

Section 901. General rule.

(a) Determination.---Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request. All applicable fees shall be paid in order to receive access to the record requested.

(b) Time for response.---The time for response shall not exceed:

(1) In the case of a request made in person or submitted by regular mail, e-mail, web form, facsimile or similar means, five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.

(2) (Reserved).

Section 1101. Filing of appeal.

[(a) Authorization.--

(1) If a written request for access to a record is]

(a) Authorization.--The following shall apply:

(1) (i) If a written request for access to a record is denied or deemed denied, the requester may file an appeal with the Office of Open Records or judicial, legislative

or other appeals officer designated under section 503(d) within [15] 20 business days of the [mailing] postmark date of the agency's response or within [15] 20 business days of a deemed denial, whichever comes first.

(ii) The appeal shall [state the grounds upon which the requester asserts that the record is a public record, legislative record or financial record and shall address any grounds stated by the agency for delaying or denying the request.] include the following:

(A) A copy of the original request.

(B) The agency denial.

(C) A list of the records that were denied.

(iii) The office shall provide a form on its publicly accessible Internet website which may be used by the requester to file the appeal.

(2) Except as provided in section 503(d), in the case of an appeal of a decision by a Commonwealth agency or local agency, the Office of Open Records shall assign an appeals officer to review the denial.

(b) Determination.--

(1) Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a). The appeals officer may extend this deadline by up to 15 days by providing notice to both parties. If a hearing or in-camera review is held under section 1102(a)(2), the appeals officer may extend the deadline up to 90 additional days.

(1.1) If the issue before the office is substantially the same as an issue currently on appeal to Commonwealth

Court, the appeals officer may stay the appeal until Commonwealth Court issues a decision on the matter.

(2) If the office or other appeals officer fails to issue a final determination within 30 days, the appeal is deemed denied.

(3) Prior to issuing a final determination, a hearing may be conducted. The determination by the appeals officer shall be a final order. The appeals officer shall provide a written explanation of the reason for the decision to the requester and the agency.

(c) Direct interest.--

(1) A person other than the agency or requester with a direct interest in the record subject to an appeal under this section may, within 15 days following receipt of actual knowledge of the appeal but no later than the date the appeals officer issues an order, file a written request to provide information or to appear before the appeals officer or to file information in support of the requester's or agency's position.

(2) The appeals officer may grant a request under paragraph (1) if:

(i) no hearing has been held;

(ii) the appeals officer has not yet issued its order; and

(iii) the appeals officer believes the information will be probative.

(3) Copies of the written request shall be sent to the agency and the requester.

Section 8. Section 1102(a) of the act is amended and the section is amended by adding a subsection to read:

Section 1102. Appeals officers.

(a) Duties.--An appeals officer designated under section 503 shall do all of the following:

(1) Set a schedule for the requester and the open-records officer to submit documents in support of their positions.

(2) Review all information filed relating to the request. The appeals officer may hold a hearing or conduct an in-camera review under subsection (c), in which case the appeals officer may extend the deadline in section 1101(b)(1) by up to 90 days. A decision to hold or not to hold a hearing is not appealable. The appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. The appeals officer may limit the nature and extent of evidence found to be cumulative.

(3) Consult with agency counsel as appropriate.

(4) Issue a final determination on behalf of the Office of Open Records or other agency.

* * *

(c) Review.--The Office of Open Records may require an agency to submit a record for the purpose of conducting an in-camera review to determine if the record is a public record.

Section 9. Section 1301 heading and (a) of the act are amended to read:

Section 1301. Commonwealth agencies, legislative agencies [and], judicial agencies and the Office of Open Records.

(a) General rule.--Within 30 days of the mailing date of the final determination of the appeals officer relating to a

decision of a Commonwealth agency, a legislative agency [or], a judicial agency or the Office of Open Records issued under section 1101(b) or the date a request for access is deemed denied, a requester or the agency may file a petition for review or other document as might be required by rule of court with the Commonwealth Court. The court shall notify the Commonwealth agency, legislative agency, judicial agency or Office of Open Records of the appeal. The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision.

* * *

Section 10. Section 1307(h) of the act is amended and the section is amended by adding a subsection to read:

Section 1307. Fee limitations.

* * *

(g.1) Additional fees.--

(1) Notwithstanding subsection (e), each agency may assess fees for responding to commercial requests under this act. In addition to fees under subsections (a) and (b), reasonable standard charges may be charged for document search, review and redaction for documents for commercial use.

(2) Fees under paragraph (1) must be calculated at no more than the hourly wage of the lowest-paid public employee of the agency who is capable of searching, retrieving, reviewing and providing for redaction of the information necessary to comply with the request.

(h) Prepayment.--Prior to granting a request for access in accordance with this act, an agency may require a requester to

prepay an estimate of the fees authorized under this section if the fees required to fulfill the request are expected to exceed [$100] $50.

Section 11. Section 1310 of the act is amended to read:

Section 1310. Office of Open Records.

(a) Establishment.--There is established [in the Department of Community and Economic Development an] the Office of Open Records, as an independent agency. The office shall do all of the following:

(1) Provide information relating to the implementation and enforcement of this act.

(2) Issue advisory opinions to agencies and requesters.

(3) Provide annual training courses to agencies, public officials and public employees on this act and 65 Pa.C.S. Ch. 7 (relating to open meetings).

(4) Provide annual, regional training courses to local agencies, public officials and public employees.

(5) Assign appeals officers to review appeals of decisions by Commonwealth agencies or local agencies, except as provided in section 503(d), filed under section 1101 and issue orders and opinions. The office shall employ or contract with attorneys to serve as appeals officers to review appeals and, if necessary, to hold hearings on a regional basis under this act. Each appeals officer must comply with all of the following:

(i) Complete a training course provided by the Office of Open Records prior to acting as an appeals officer.

(ii) If a hearing is necessary, hold hearings regionally as necessary to ensure access to the remedies

provided by this act.

(iii) Comply with the procedures under section 1102(b).

(6) Establish an informal mediation program to resolve disputes under this act.

(7) Establish an Internet website with information relating to this act, including information on fees, advisory opinions and decisions and the name and address of all open records officers in this Commonwealth.

(8) Conduct a biannual review of fees charged under this act.

(9) Annually report on its activities and findings to the Governor and the General Assembly. The report shall be posted and maintained on the Internet website established under paragraph (7).

(b) Executive director.--Within 90 days of the effective date of this section, the Governor shall appoint an executive director of the office who shall serve for a term of six years. Compensation shall be set by the Executive Board established under section 204 of the act of April 9, 1929 (P.L.177, No.175), known as The Administrative Code of 1929. The executive director may serve no more than two terms.

(c) Limitation.--The executive director shall not seek election nor accept appointment to any political office during his tenure as executive director and for one year thereafter.

(d) Staffing.--The executive director shall appoint attorneys to act as appeals officers and additional clerical, technical and professional staff as may be appropriate and may contract for additional services as necessary for the performance of the executive director's duties. The compensation

of attorneys and other staff shall be set by the Executive Board. The appointment of attorneys shall not be subject to the act of October 15, 1980 (P.L.950, No.164), known as the Commonwealth Attorneys Act.

(e) Duties.--The executive director shall ensure that the duties of the Office of Open Records are carried out and shall monitor cases appealed to the Office of Open Records.

(e.1) Public comment.--The office shall abstain from public comment about a pending proceeding before the office. This subsection shall not prohibit the executive director from making public statements in the course of official duties, from issuing written advisory opinions, from making general comments on this act that are not related to a pending case or from explaining the procedures of the office.

(f) Appropriation.--The appropriation for the office shall be in a separate line item and shall be under the jurisdiction of the executive director.

(g) Participation.--The office may participate as amicus curiae in an appeal from a decision of the office and may, upon approval of an appellate court, participate in oral argument.

Section 12. This act shall take effect in 90 days.